RETREAT AND REACTION: AN ANALYSIS OF THE TORT REFORM ACT*

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I. THE TORT REFORM PROCESS

In 1979, the Interagency Task Force published the Model Uniform Product Liability Act (UPLA).[1] Since then, the course taken by the proponents of products liability reform has been almost exclusively a federal one,[2] notwithstanding the model law approach of UPLA.[3] Nevertheless, failure of the federal initiatives in 1986 coupled with the Democratic takeover of the Senate and the Chairmanship of the Senate Commerce Committee shifted the momentum for reform to the states.[4]

In May, 1985, Senate Bill No. 126, which provided for various reforms of medical malpractice law and procedure, failed before the Missouri legislature. As a direct result, a Senate Interim Committee was established under the chairmanship of Senator J. Mathewson. The committee, which conducted hearings around the state during the fall of 1985, was charged with examining the malpractice and products liability insurance "crises." The Interim Committee's work and the

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1. *Reprinted in* 44 Fed. Reg. 62,714-50 (1979).

2. *See, e.g.*, S. 44, 98th Cong., 2d Sess. (1984) (Kasten); S. 100, 99th Cong., 1st Sess. (1986) (Kasten); S. 2760, 99th Cong., 2d Sess. (1986) (Commerce Committee reported bill); S. 1999, 99th Cong., 1st Sess. (1986) (Danforth, as amended); H.R. 2729, 98th Cong., 1st Sess. (1983) (Shumway & Mikulski).

3. UPLA was drafted for "voluntary use by the states." 44 Fed. Reg. 62,714 (1979).

4. 15 PROD. SAFETY & LIAB. REP. (BNA) 51 (1987). However, the tide of federal proposals has not been turned fully. *See, e.g.*, S. 687, 688, 100th Cong., 1st Sess. (1987) (Danforth); S. 666, 100th Cong., 1st Sess. (1987) (Kasten with amendments); H.R. 635, 100th Cong., 1st Sess. (1987) (Dannemeyer); H.R. 1115, 100th Cong., 1st Sess. (1987) (Richardson & Luken); H.R. 1599, 100th Cong., 1st Sess. (1987) (McKinney). Furthermore, most of the insurance and commerce lobbying campaigns were nationally driven, fuelled by reports of increasing liability insurance rates.

legislative compromise between provider groups and the plaintiff's bar[5] concentrated almost exclusively on medical malpractice.[6] However, subsequent Senate interest in products liability reform and House interest in punitive damages guaranteed that the next legislative session would see the introduction of major tort reform legislation.

In August, 1986, a task force[7] under the chairmanship of John C. Shepherd was appointed by Governor John Ashcroft and the legislature.[8] Its stated purpose was to investigate and recommend changes to the state's liability and insurance systems.[9] Its apparent purpose was to produce a compromise agreement between the Missouri Association of Trial Attorneys (MATA-the plaintiff's bar) and a group representing defense interests called Missourians for Civil Justice Reform.[10] Because the task force was established to produce acceptable pro-defense "crisis" legislation, it is worthy of note that in its final report the task force seemed uncertain whether there was any real crisis at all.[11] The task force held public hearings between August and October, 1986 and then concentrated on producing a legislative compromise. Agreement almost eluded the task force when MATA refused to countenance the proposed reform of joint and several liability.[12] However, at its final meeting on January 5, 1987, the parties agreed to minor modifications of the joint and several liability rule that eventually were enacted.[13]

On the basis of the task force report,[14] House Bill 700[15] was drafted and introduced before the General Assembly on February 9, 1987. After passage through the House,[16] the bill was approved by the Senate Budget Control Committee[17] and introduced in the Senate,[18] notwithstanding criticism by Ralph Nader.[19] When the bill came up before the Senate on its third reading, an

5. *See* MO. REV. STAT. §§ 538.205-538.235 (1986).

6. *See generally* Terry, *Missouri's Malpractice Concord*, 51 MO. L. REV. 457 (1986).

7. Officially known as The Missouri Task Force on Liability Insurance. *See Final Report of the Missouri Task Force on Liability Insurance* (Jan. 6, 1987), MO. SENATE J., March 4, 1987, at 357 [hereinafter cited as *Final Report*].

8. Senate President John Scott and House Speaker Bob Griffin. Originally, the Senate had intended to act independently with a Select Committee. However, the House indicated that it would counter with its own proposals and the Governor was considering his own initiative. Therefore, the parties agreed to a single task force, with each of the three moving parties appointing five members.

9. *Final Report*, *supra* note 7, at 358-59, 361-65.

10. *See generally* St. Louis Bus. Journal, Jan. 5-11, 1987 at 6, col. 1.

11. *Final Report*, *supra* note 7, at 358-59, 361-65.

12. St. Louis Bus. Journal, Jan. 5-11, 1987 at 7, col. 2.

13. *See infra* text accompanying notes 202-11.

14. The Task Force's report was entered into the Senate Record. Thus, House Bill possesses a legislative history which will be of considerable importance in its interpretation. *See Final Report*, *supra* note 7, at 357.

15. 84th Gen. Ass., 1st Reg. Sess. (1987) [hereinafter referred to as H.B. 700].

16. February 19, 1987.

17. MO. SENATE J., Feb. 26, 1987, at 321.

18. *Id.* at 324.

19. Causing the News Tribune of Jefferson City to state in an editorial, "[a]s Missouri pulls itself out of the liability quicksand, our lawmakers need to be wary of big-name activists who would cut off the only path to safety."

amendment was offered and passed[20] deleting the section limiting awards of punitive damages against newspapers.[21] That amendment had been defeated in the House.[22] Thus the fragile consensus surrounding the passage of the bill was threatened. At this time the only other provision threatening the bill's passage was the section permitting credit from previous punitive damage awards.[23] That, too, was removed from the bill,[24] prior to its unanimous passage by the Senate on March 9, 1987.[25] A conference committee agreed to the deletion of the libel provision and compromised on the punitive damage credit provision.[26] House and Senate approval followed.[27] On April 14, 1987, Governor Ashcroft signed the bill into law.[28]

House Bill 700 focuses on three issues: regulation of certain aspects of property and casualty insurance including capitalization requirements, limitations on cancellation, rate regulation and claims reporting; tort reform specific to products liability cases; and, reform of general applicability to tort law, other than in medical malpractice cases. This article seeks to provide a contextual analysis of the changes wrought to the products liability and tort systems.

II. MISSOURI PRODUCTS LAW—SOME NECESSARY BACKGROUND

In 1969, the Missouri Supreme Court in *Keener v. Dayton Electric Manufacturing Co.*,[29] introduced strict tort liability to supplement the implied warranty doctrine[30] and moved Missouri products law into the mainstream. *Keener* placed Missouri in alignment with the majority of jurisdictions in adopting the formulation of liability found in the Second Restatement of Torts, Section 402A.[31]

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20. Mo. SENATE J., March 2, 1987, at 343-44.

21. This section, the original section 44 in the bill, would have placed a variable cap on such awards based upon the circulation of the newspaper.

22. St. Louis Post-Dispatch, March 3, 1987, at 12C, col. 3.

23. This was the subject of proposed Senate Amendment No. 4 which would have deleted what was passed finally in modified form as § 39.4.

24. St. Louis Post-Dispatch, Mar. 5, 1987, at 4A, col. 4.

25. St. Louis Post-Dispatch, Mar. 10, 1987, at 6A, col. 2.

26. By clarifying the grounds upon which the trial judge could refuse to grant the credit. *See infra* text accompanying notes 170-78.

27. *See generally* The Columbia Missourian, Apr. 1, 1987, at 1A, col. 1; St. Louis Post-Dispatch, Apr. 1, 1987, at 6A, col. 1.

28. St. Louis Post-Dispatch, Apr. 15, 1987, at 5A, col. 5. H.B. 700, as enacted, contained an emergency clause applying the provisions of the new legislation to any cause of action accruing after July 1, 1987. H.B. 700, *supra* note 15, at § C.

29. 445 S.W.2d 362 (Mo. 1969).

30. Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963) (en banc).

31. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in

Missouri courts have continued to apply that basic principle of strict liability whether a plaintiff is alleging a manufacturing (quality control) defect,[32] a design defect,[33] or a marketing (warning) defect.[34] Whatever the allegation, plaintiff's burden includes showing that the product's use was a reasonably foreseeable use.[35]

As with the current Missouri verdict director,[36] House Bill 700 confusingly treats manufacturing and design defects[37] as a single allegation distinct from the marketing defect (failure to warn).[38] However, House Bill 700 breaks new ground for Missouri law in that section 33 introduces a new statutory definition of a "Products Liability Claim."[39] At first this provision appears to do little more

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the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

32. Keener v. Dayton Elec. Mfg., Co., 445 S.W.2d 362 (Mo. 1969).

33. Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. 1977); Duke v. Gulf & W. Mfg. Co., 660 S.W.2d 404, 411-12 (Mo. Ct. App. 1983).

34. Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984) (en banc).

35. *See, e.g.*, Klein v. General Elec. Co., 714 S.W.2d 896, 900 (Mo. Ct. App. 1986). *Compare* H.B. 700, *supra* note 15, at § 33(2), which uses the phrase "reasonably anticipated" use. *See* Mo. APPROV. JURY INSTR. 25.04 (3d ed. 1981 and Supp. 1987) [hereinafter MAI]. For the co-existence of reasonable foresight as part of plaintiff's case with the new comparative fault affirmative defense of product misuse, see *infra* text accompanying notes 139-49.

36. MAI § 25.04 provides:

Strict Liability - Product Defect

Your verdict must be for plaintiff if you believe:

First, the defendant sold the (*describe product*) in the course of defendant's business, and

Second, the (*describe product*) was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the (*describe product*) was used in a manner reasonably anticipated, and

Fourth, plaintiff was damaged as a direct result of such defective condition as existed when the (*describe product*) was sold.

37. H.B. 700, *supra* note 15, at § 33(3)(a).

38. *Id.* at § 33(3)(b).

39. [A] claim or portion of a claim in which the plaintiff seeks relief in the form of damages on a theory that the defendant is strictly liable for such damages because:

(1) The defendant, wherever situated in the chain of commerce, transferred a product in the course of his business; and

(2) The product was used in a manner reasonably anticipated; and

(3) Either or both of the following:

(a) The product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold; or

(b) The product was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and the plaintiff was damaged as a direct result of the product being sold without an adequate warning.

Id. at § 33.

than confirm Missouri's current doctrinal statement of the elements of a plaintiff's case. A philosophical attack might be levelled against any such unnecessary codification of an evolving area of the common law. However, such a consideration is dwarfed by a more profound technical question concerning the applicability of House Bill 700 to contractual implied warranty claims.

Products liability practitioners acknowledge that, today, there are few important substantive distinctions between warranty and strict tort theories of products liability. It is arguable that section 33 does not address this contractual variant on products liability law. Judicial endorsement of this view would lead to wholesale circumvention of House Bill 700's provisions regarding mere sellers, state of the art evidence, and comparative fault. Unfortunately, the language of section 33, dependent as it is on the language of current Missouri products law, would be difficult to interpret as referring to anything other than the strict tort action.[40]

Let us presume, however, that contrary to the terminology of House Bill 700, the Missouri Supreme Court was to interpret section 33 as also applying to implied warranty claims. Such an interpretation would have the effect of applying comparative fault principles[41] to warranty claims that are really "loss of bargain" cases.[42] That would involve a radical departure from the current state of Missouri law,[43] a departure not envisaged by the Task Force.

These problems could be avoided and the legislative intent given effect with the following interpretation. Rather than pose the question "What do we understand by a 'products liability claim'?" in the hope of determining whether that includes a warranty claim, a preferable approach is to pose the question, "What do we mean by a 'breach of warranty claim'?"

Contemporary implied warranty doctrine contemplates two distinct actions: first, "a remedy for a bad bargain, a matter more like contract;"[44] second, "consequential damages resulting from a bad product, a matter more like tort."[45] It is suggested that this approach should be adopted by the Missouri Supreme Court in interpreting House Bill 700, section 33 and, in determining the applicability of the substantive provisions of the new statute. In accordance with current Missouri views on the appropriateness of certain redistributive mechan-

40. One radical approach would be to interpret section 33 as initiating a new statutory products cause of action distinct from strict liability, negligence or warranty. *See* McIlwain v. Moser Farms Dairy, Inc., 40 Conn. Supp. 230, 488 A.2d 102 (1985).

41. Because H.B. 700, *supra* note 15, at § 33 controls the applicability of section 36.2.

42. *See generally* East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). *See also* Solimine, *Recovery of Economic Damages in Products Liability Actions and the Reemergence of Contractual Remedies*, 51 Mo. L. REV. 977 (1987).

43. *See, e.g.*, Crank v. Firestone Tire & Rubber Co., 692 S.W.2d 397 (Mo. Ct. App. 1985). *See also* Lesmeister v. Dilly, 330 N.W.2d 95, 101-02 (Minn. 1983). *Cf. In Re* Certified Questions from United States Court of Appeals for the Sixth Circuit, 416 Mich. 558, 331 N.W.2d 456 (1982).

44. Peterson v. Bendix Home Systems, Inc., 318 N.W.2d 50, 54 (Minn. 1982).

45. *Id.*

isms,[46] House Bill 700 should be interpreted as applying not merely to torts claims but also to those warranty claims that provide remedies for similar types of injuries.

III. PRODUCTS LIABILITY DEFENDANTS

In keeping with most jurisdictions, Missouri courts extended the reach of strict liability to most of the parties involved in the chain of distribution.[47] In its definition of a products liability action, House Bill 700, section 33(1) provides for no differentiation between defendants "wherever situated in the stream of commerce." If this provision is to be interpreted as a general definition of Missouri strict products liability law rather than a mere statement of the broad applicability of the provisions of House Bill 700, liability now extends to all transferors. Although the transfer must take place in the course of the transferor's business, there appears to be no requirement that the defendant's business consist of the transferring of such products.[48]

Just as this definition section may not have been intended to expand the current liability of sellers, so section 34 may prove to be less than successful in reducing the liability of some product conduits. The statute provides for the dismissal of "[a] defendant whose liability is based solely on his status as a seller in the stream of commerce."

The purpose of this new rule is to reduce the litigation costs of retailers (or other mere conduits) who routinely are joined as co-defendants in products liability cases brought primarily against manufacturers.[49] Its applicability is limited to a "products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim. . . ."[50]

In this regard, the exact meaning of "another defendant" is problematic. Take a case in which there is both a non-manufacturer products liability seller defendant (our mere conduit who is a pharmacist dispensing a prescription drug) and a non-products liability defendant (the physician who prescribed the drug). Could the seller move for dismissal on the basis that "another defendant . . . [was] properly before the court"? Presumably, to achieve the apparent legislative

46. *See, e.g.*, Sharp Bros. v. American Hoist & Derrick Co., 703 S.W.2d 901 (Mo. 1986). For a compelling exposition of the tort/warranty border, *see East River S.S. Corp.*, 476 U.S. 858.

47. *Cf.* Wright v. Newman, 735 F.2d 1073 (8th Cir. 1984); Gabbard v. Stephenson's Orchard, Inc., 565 S.W.2d 766 (Mo. Ct. App. 1978); Williams v. Ford Motor Co., 494 S.W.2d 678 (Mo. Ct. App. 1973). *See also* Commercial Distribution Center, Inc. v. St. Regis Paper Co., 689 S.W.2d 664 (Mo. Ct. App. 1985); Gunderson v. Sani-Kem Corp., 674 S.W.2d 665 (Mo. Ct. App. 1984); Hunt v. Guarantee Elec. Co. of St. Louis, 667 S.W.2d 9 (Mo. Ct. App. 1984); Chubb Group of Ins. Cos. v. C.F. Murphy & Assocs., Inc., 656 S.W.2d 766 (Mo. Ct. App. 1983); Racer v. Utterman, 629 S.W.2d 387, 399-400 (Mo. Ct. App. 1981).

48. *Cf.* Keen v. Dominick's Finer Foods, Inc., 49 Ill. App. 3d 480, 364 N.E.2d 502 (1977).

49. This provision is loosely based upon the Model Uniform Product Liability Act § 104.

50. H.B. 700, *supra* note 15, at § 34.2.

intent, the court will have to read "another defendant" as "another [products liability] defendant." A precondition to any order dismissing a mere conduit is that another defendant is before the court "from whom total recovery may be had for plaintiff's claim."[51] Thus, dismissal of a non-manufacturer should not be granted where the product manufacturer defendant is not subject to process under Missouri law or is insolvent.

Additionally, Missouri courts will have to develop criteria to determine when a defendant's liability is "based solely on his status as a seller." At issue[52] will be not only a seller's role with regard to the design or construction of the product but also, for example, any alleged failure to pass on adequate warnings.[53] Likewise, sellers who do (or fail to do) more than act as mere conduits, will usually face liability on negligence principles. Because the new dismissal provisions apply only to strict liability counts,[54] an allegation of negligence against a mere seller will preempt the new system.[55]

An additional problem of interpretation concerns the defendant-beneficiaries of the dismissal provisions. Modern products doctrine has evolved beyond the

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51. *Id.*

52. Denial of such allegations must be made under oath according to the procedure outlined in H.B. 700, *supra* note 15, at § 34.3.

53. Consider, for example, Sliman v. Aluminum Co., 112 Idaho 277, 731 P.2d 1267 (1986) (bottle cap supplier held to have duty, independent of bottler, to warn consumers that cap could fly off and to provide instructions for safe removal).

54. H.B. 700, *supra* note 15, at § 34 only applies to a defendant in a "products liability claim." Such a claim is defined in section 33 as one brought on a strict liability theory.

55. H.B. 700, *supra* note 15, at § 34 provides the procedure to be followed in cases where a mere conduit seeks dismissal:

> 3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at a later time for good cause shown. The motion shall be accompanied by an affidavit which shall be made under oath and shall state that the defendant is aware of no facts or circumstances upon which a verdict might be reached against him, other than his status as a seller in the stream of commerce.
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> 4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.
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> 5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such a hearing with evidence of facts which would render the defendant seeking dismissal under this section liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.
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> 6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.
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> 7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

Restatement position of imposing liability on "sellers." Liability can be imposed on lessors as well as sellers.[56] However, a broad interpretation of "defendant" for *imposing* liability will not necessarily apply to Missouri's new provision *excluding* a mere "seller" from liability.[57] Similar problems will be confronted by other nonsellers seeking dismissal, such as bailors, licensors, franchisers and non-immune employers.

IV. STATE OF THE ART EVIDENCE[58]

Missouri has adopted the orthodox approach to distinguishing strict products liability from its negligence predecessor. In strict liability cases the manufacturer's foresight of the risk of harm is presumed.[59] Further, the judgmental criteria that are applied to the question of the product's defectiveness emphasize the issue of safety rather than the reasonableness of the producer's conduct.[60] Contrary to the position in most states,[61] Missouri has elected to retain the manipulatable *Restatement*-based "defective condition unreasonably dangerous" standard as its ultimate issue.[62]

Absent development of a meaningful test for legal defectiveness,[63] the Missouri Supreme Court has lacked a context within which to judge the relevancy

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56. *See, e.g.*, Francioni v. Gibsonia Truck Corp., 472 Pa. 362, 372 A.2d 736 (1977). *See generally* Thorpe v. Robert F. Bullock, Inc., 179 Ga. App. 867, 348 S.E.2d 55 (1986).

57. H.B. 700, *supra* note 15, at § 33(1) defines product liability defendant in terms of someone who "transferred" a product in the course of business. It is a difficult argument to make convincingly that, in section 34, the far narrower word "seller" was intended to have the same meaning. For a telling discussion of the broad meaning ascribed to sellers under the Restatement, see Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681, 685-88 (1970).

58. *See generally* Robb, *A Practical Approach to the Use of State of the Art Evidence in Strict Products Liability Cases*, 77 NW. U.L. REV. 1 (1982); Wade, *On the Effect in Product Liability of Knowledge Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983); St. Leger, Goggin & Brophy, *Toxic Torts: Workable Defenses Available to the Corporate Defendant*, 28 VILL. L. REV. 1208, 1250 (1983); Note, *When the Best Defense is No Defense: The Future of State of the Art Evidence in Product Liability Actions in Missouri*, 50 Mo. L. REV. 438 (1985).

59. *See generally* Terry, *Stricter Products Liability*, 52 Mo. L. REV. 1 (1987).

60. *Id.*

61. Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 378 n.11 (Mo. 1986) (en banc).

62. "Though Missouri has adopted the rule of strict tort liability as set forth in the *Restatement*, we have not yet formally incorporated, in any meaningful way, the *Restatement's Consumer Expectation Test* into the lexicon of our products liability law. Nor have we yet decided to travel or required plaintiffs to travel the path of risks and utilities. And in this connection, we note that none of the parties in the present case, at either the trial level or on appeal, has raised as an issue the applicable standard by which to determine when a product as designed, is defective and therefore actionable." *Id.* at 377-378 (footnote and citation omitted) (emphasis added). *See generally* Terry, *supra* note 59, at 30-40 (1987). For a critical analysis of the various approaches to legal defectiveness, see Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861 (1983).

63. For the distinction between "legal" and "factual" defectiveness, *see* Terry, *supra* note 59, at 21-24.

of state of the art evidence.[64] Rather, it has adopted a blanket proscription on the admissability of such evidence.[65] However, this total embargo has failed to do justice to the complexity of the state of art concept.[66] State of the art has at least three different meanings in modern products liability litigation. These are what may be termed industry practice,[67] industry capability,[68] and industry or scientific knowability.[69]

It is arguable that the Missouri Supreme Court in both *Elmore* and *Nesselrode* dealt only with the admissibility of state of the art evidence in the first sense. The argument may be made that not only should state of the art evidence in the second and third senses be admissible in a strict products liability action, but the very issues posed by accepted definitions of unreasonably dangerous simply cannot be addressed absent such evidence.[70]

Furthermore, admitting evidence of industry capability (or, for that matter, industry knowability in warning cases) involves neither the admissibility of industry custom nor the abrogation of that basic tenet of products doctrine—to

64. It is not intended to convey the impression that the supreme court has been neglectful in its dealings with state of the art evidence. Several willful yet defensible motivations may be suggested. First, the court may have decided that the subtleties of distinctions between various types of state of the art evidence would be impossible for the jury to understand. Therefore, the total ban on such evidence constitutes something of a prophylactic rule. Second, the court may have decided that such defensive use of that evidence would interfere with what the court saw as the redistributive goal of modern products liability doctrine.

65. *Nesselrode*, 707 S.W.2d at 383 ("[L]iability may be imposed without regard to the defendant's knowledge or conduct. This view comports with the very raison d'etre of strict tort liability law. In *Elmore*, we reaffirmed the principle that strict tort liability is not predicated on the presence of fault or the existence of knowledge." (citations omitted)); Lippard v. Houdaille Industrs., Inc., 715 S.W.2d 491, 492 (Mo. 1986) (en banc); *Elmore*, 673 S.W.2d at 438 ("the law in Missouri holds that state of the art evidence has no bearing on the outcome of a strict liability claim."); *Klein*, 714 S.W.2d at 905; Johnson v. Hannibal Mower Corp., 679 S.W.2d 884 (Mo. Ct. App. 1984).

66. *See generally* Birnbaum & Wrubel, *"State of the Art" and Strict Products Liability*, 21 TORT & INS. L. J. 30, 37-38 (1985); Calnan, *Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases*, 36 SYRACUSE L. REV. 797 (1985); Wade, *supra* note 58; Robb, *supra* note 58.

67. The generally accepted and, thus, customary practices of the defendant's particular industry at the time the product was manufactured.

68. Not merely the customary practices of the industry in question, but rather the technology available to the defendant's industry at the time of manufacture. Some defendants add an additional complication to this type, drawing a distinction between industry knowability at the time of trial and at the time of marketing.

69. The knowledge or discoverability at the time of manufacture of the risks associated with the product.

70. *See, e.g.*, McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764, 767 (1983). *Cf.* Couch v. Mine Safety Appliances Co., 107 Wash. 2d 232, 728 P.2d 585 (1986) (en banc). *See also* Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987). (Evidence of feasible alternative design held to be not always required. An unimprovable product could be so dangerous as to warrant its removal from the marketplace).

judge the product, not the manufacturer.[71] House Bill 700 has left open the admissibility of "industry capability" evidence by providing that "[t]his section shall not be construed to permit or prohibit evidence of feasibility in products liability claims."[72] The Governor's Task Force saw "this as a separate issue, one upon [which] it is not making a specific recommendation to the General Assembly."[73]

Only in warning cases[74] involving evidence of industry knowability does the statute overturn recent pronouncements of the Missouri Supreme Court.[75] House Bill 700 provides: "[a]s used in this section, 'state of the art' means that the dangerous nature of the product was not known and could not reasonably be discovered at the time the product was placed into the stream of commerce."[76] Interestingly, while the defense bar has been arguing inaccurately for a state of the art "defense,"[77] this is exactly what the Missouri legislature has produced, allocating the burden of proof as to scientific unknowability to the defendant.[78]

Because the legislation restricts the admissibility of "scientific knowability" evidence to marketing defect cases,[79] the traditional, "constructive foresight" distinction between negligence and strict liability is preserved in most products liability cases. It is only in marketing cases that there is now some uncertainty with regard to the distinction between negligence and strict liability theories.[80]

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71. *See, e.g.*, Woodill v. Parke Davis & Co., 79 Ill. App. 2d 203, 402 N.E.2d 194, 198 (1980): We perceive that requiring a plaintiff to plead and prove that the defendant manufacturer knew or should have known of the danger that caused the injury, and that the defendant manufacturer failed to warn plaintiff of that danger, is a reasonable requirement, and one which focuses on the nature of the product and on the adequacy of the warning, rather than on the conduct of the manufacturer.

72. H.B. 700, *supra* note 15, at § 35.4.

73. *Final Report*, *supra* note 7, at 382.

74. H.B. 700, *supra* note 15, at § 35.2. "The state of the art shall be a complete defense and relevant evidence only in an action based upon strict liability for failure to warn of the dangerous condition of a product."

75. Thus, commentators have been cheated of the answers to at least two questions. First, given that the issue of industry knowability in warning cases had never been briefed before the supreme court, would such a Draconian stance have been adopted? Second, even if it had, would the supreme court have backed down from this position as did its brother court in New Jersey? *See* Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982). *Cf.* Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984). *See generally In re* Asbestos Litig., 628 F. Supp. 774 (D.N.J. 1986) (Equal protection challenge premised on the distinctive treatment meted out to the asbestos industry by New Jersey products liability doctrine).

76. H.B. 700, *supra* note 15, at § 35.1.

77. Inaccurate, because the evidence they have sought to introduce goes to issues on which plaintiff traditionally has the burden of proof.

78. H.B. 700, *supra* note 15, at § 35.2.

79. *Id.*

80. This conceptual difficulty has not been aided by remarks of the Governor's Task Force that the most important distinction remaining after H.B. 700 was that, under a negligence theory, the plaintiff could bring an action for failure to warn of a defect discovered *after* manufacture and sale. *Final Report*, *supra* note 7, at 382.

What is certain is that failure to warn allegations will cease to be routinely pleaded by plaintiffs.

A further complication not dealt with by the legislature concerns the applicability of defensive state of the art evidence in cases involving punitive damage claims. In a punitive damage claim liability will depend upon the defendant having actual knowledge that the product was defective and unreasonably dangerous at the time of sale. Regardless of how the Missouri Supreme Court disposes of the admissability of industry capability evidence in design defect cases, it will be forced to admit such state of the art evidence in the punitive damage context. As the Court of Appeals for the Fourth Circuit remarked: "Clearly, whether or not [defendants] followed industry standards and complied with the state of the art. . .is probative on the issue of the wantonness, willfulness and maliciousness of their acts. . . ."[81] The bifurcation provision contained in House Bill 700[82] does not deal with this evidentiary issue. Under that provision, *liability* for punitive damages is decided at the same time as liability for compensatory damages.

V. COMPARATIVE FAULT AND PRODUCTS LIABILITY

A. In General

Of all of the reforms introduced by House Bill 700, the introduction of a statutory form of comparative fault for products liability cases will have the most dramatic impact on the practical application of the substantive law of Missouri. For the first time since the supreme court renewed its active interest in tort law in 1983,[83] the value of some cases has been reduced and the defense has been given a powerful new tool to use both at trial and in settlement conferences.

According to the Restatement,[84] contributory negligence is not a defense in a strict products liability action.[85] However, contributory *fault* is recognized as a defense. While "contributory negligence raises questions about the plaintiff's reasonable, objective knowledge, contributory fault raises questions about the

81. Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192, 1198 (4th Cir. 1982) (applying law of South Carolina). *See also* Smith v. Firestone Tire & Rubber Co., 755 F.2d 129,133 (8th Cir. 1985) (workplace regulations admissible to rebut, *inter alia*, plaintiff's argument as to punitive damages). Compare the analogous reasoning of the Court of Appeals for the Eighth Circuit stating: "Evidence of post-sale knowledge of a defect may not be the basis for punitive damages based on strict liability for failure to warn." Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1336 (8th Cir. 1985) (applying law of Missouri).

82. H.B. 700, *supra* note 15, at § 39.2.

83. *See generally* Terry, *supra* note 59.

84. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

85. *See generally* Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With An Old Meaning*, 29 MERCER L. REV. 447 (1978).

plaintiff's actual, subjective knowledge."[86] As an affirmative defense that involves "fine-tuning" based on concerns that are "subjective, conscious and personal to the plaintiff,"[87] contributory fault is closely related to the well-established defense of assumption of risk. Indeed, as the court of appeals has stated, "for contributory fault instructions, to be proper, there must be evidence of awareness or knowledge of the precise danger in the defect asserted by the plaintiff, who thereafter voluntarily assumes the risk of *that* danger."[88] No Missouri opinion has levelled any serious challenge to this narrow circumscription of the contributory fault defense.[89]

Missouri consistently rejected contributory negligence as having any applicability in products liability cases.[90] However, after the Missouri Supreme Court adopted the principles of comparative negligence in *Gustafson v. Benda*,[91] it was generally presumed that Missouri would follow the majority of states and apply that concept to strict products liability claims.[92] Indeed, after *Gustafson*, the federal courts took the view that Missouri would adopt the comparative approach.[93] Such a conclusion was reinforced by the *Gustafson* court's apparent

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86. Peterson v. Auto Wash Mfg. & Supply Co., 676 F.2d 949, 953 (8th Cir. 1982) (applying Missouri law). *See also* MAI 32.23-Contributory Fault, which provides:

> Your verdict must be for defendant if you believe:
>
> First, when the (*describe product*) was used, plaintiff knew of the danger as submitted. . . and appreciated the danger of its use, and
>
> Second, plaintiff voluntarily and unreasonably exposed himself to such danger, and
>
> Third, such conduct directly caused or directly contributed to cause any damage plaintiff may have sustained.

87. Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 815 (9th Cir. 1974). Note, however, that,

> [W]hile the test to be applied in determining whether a user has assumed the risk of using a product known to be dangerously defective is fundamentally a subjective test, in the sense that it is *his* knowledge, understanding and appreciation of the danger which must be assessed, rather than that of the reasonably prudent person, it must also be remembered that this is ordinarily a question to determined by the jury. That determination is not to be made solely on the basis of the user's own statements but rather upon the jury's assessment of all of the facts established by the evidence.

Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305, 312 (1970) (citation omitted).

88. Uder v. Missouri Farmers Ass'n Inc., 668 S.W.2d 82, 89 (Mo. Ct. App. 1983). *See also* Klein v. R.D. Werner Co., Inc., 98 Wash. 2d 316, 654 P.2d 94, 95-96 (1982) (en banc).

89. *See, e.g.*, England v. Gulf & W. Mfg. Co., 728 F.2d 1026 (8th Cir. 1984); Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 833-34 (Mo. Ct. App. 1984); Lewis v. Envirotech Corp., 674 S.W.2d 105 (Mo. Ct. App. 1984), Williams v. Deere & Co., 598 S.W.2d 609, 613 (Mo. Ct. App. 1980).

90. Rogers v. Toro Mfg. Co., 522 S.W.2d 632, 638 (Mo. Ct. App. 1975). Obviously, contributory (or comparative) negligence is relevant when plaintiff brings a products liability action based on a negligence theory. *See* Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980).

91. 661 S.W.2d 11 (Mo. 1983) (en banc).

92. *See, e.g.*, Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983) (containing exhaustive review of authorities). *See generally* Annot., 9 A.L.R. 4th 633 (1981).

93. *See, e.g.*, Gearhart v. Uniden Corp., 718 F.2d 147 (8th Cir. 1986).

adoption of the Uniform Comparative Fault Act.[94] Specifically, section 1(a) of the Uniform Act provides:

> In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

In describing the application of these principles, the Commissioners' Comment states: "'Fault'. . .includes conduct of the plaintiff or other claimant as well as the defendant. . . . Contributory fault diminishes recovery whether it was previously a bar or not, as, for example, in the case of ordinary contributory negligence in an action based on strict liability . . . ."[95]

Any such suppositions as to the state of Missouri law were rudely destroyed by the supreme court's decision in *Lippard v. Houdaille Industries, Inc.*[96] Over fierce dissents the supreme court stated "[t]he plaintiff's contributory negligence is not at issue in a products liability case. It should neither defeat nor diminish recovery."[97]

In *Lippard*, the defendant argued that the affirmative defense of *comparative negligence* should be used in situations where the court had previously denied the application of the principles of *contributory negligence*. The supreme court, however, failed to address a somewhat different situation. Suppose a plaintiff was faced by a defense of *contributory fault* that was supported by evidence on the record. Could she not argue that, rather than constituting a complete bar to recovery, her less than exemplary conduct should raise only the question of her *comparative fault*? In *Lippard*, Judge Blackmar recognized the existence of the issue but did not address its solution.[98] Nevertheless, indications were that such a change would have been resisted.[99]

B. Statutory Comparative Fault

House Bill 700 provides for abrogation of contributory fault[100] and adoption

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94. *Gustafson*, 661 S.W.2d at 15-16.

95. UNIFORM COMPARATIVE FAULT ACT, § 1 comment (b) 12 U.L.A. 38 (Supp. 1987) (emphasis added) [hereinafter cited as UCFA].

96. 715 S.W.2d 491, 493 (Mo. 1986) (en banc).

97. *Lippard*, 715 S.W.2d at 493. For a summary of the position in other jurisdictions, *see* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 425-26 (Tex. 1984).

98. *Lippard*, 715 S.W.2d at 493 n.2.

99. *See* Barnes v. Tools & Mach. Builders, Inc., 715 S.W.2d 518, 522 n.1 (Mo. 1986) (en banc) (Blackmar, J., Higgins and Rendlen, JJ., concurring). The issue remains open even after H.B. 700 in negligence products liability cases. Will *Gustafson* and the Uniform Comparative Fault Act § 1(b) have the effect of introducing comparative principles into such cases? For a collection of cases dealing with this issue in other jurisdictions, see Annot., 16 A.L.R. 4th 700 (1982).

100. Contributory fault, as a complete bar to plaintiff's recovery in a products liability claim, is abolished. The doctrine of pure comparative fault shall apply to products liability claims as provided in this section. H.B. 700, *supra* note 15, at § 36.1.

of comparative fault.[101] In returning Missouri law to, arguably, its pre-*Lippard* state, fresh impetus will be given to the post-*Gustafson* debate as to how closely Missouri law is to be modeled after the Uniform Comparative Fault Act.[102]

One question that will arise is the basis for comparison under this new comparative fault system.[103] The application of a literal comparative negligence test would run into the criticism that comparing a negligent plaintiff with a strictly liable product defendant[104] would be akin to comparing apples with oranges.[105] The Uniform Act adopts a slightly different approach—comparative causation.[106] "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed."[107] The application of this admixture of ingredients of comparative fault and comparative causation in products liability cases has been described as follows: "[T]he trier of fact is to compare the harm caused by the defective product with the harm caused by the negligence of the other defendant, any settling tortfeasors and the plaintiff."[108]

The statutory comparative fault provision lists six examples of plaintiff's[109]

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101. Defendant may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. *Id.* at § 36.2.

102. In *Gustafson*, 661 S.W.2d at 15, Judge Welliver had been responsible for the phrase that had caused the considerable disagreement evident in *Lippard* when he stated, "*[i]nsofar as possible* this and future cases shall apply the doctrine of pure comparative fault in accordance with the Uniform Comparative Fault Act §§ 1-6. . . ." (emphasis added).

103. *See generally* Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 426-35 (1985).

104. Of course, it is arguable that this is the wrong inquiry. A somewhat different and attractive approach is to abandon altogether the pretense of comparing the plaintiff with the defendant. Instead, the plaintiff's conduct should be compared to the hypothetical reasonable person. *See generally* Sandford v. Chevrolet Div. of General Motors, 292 Or. 590, 642 P.2d 624, 628-35 (1982).

105. An early reference to this species of argument is to be found in the leading comparative fault case of Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380 (1978): "The task of merging the two concepts is said to be impossible, that 'apples and oranges' cannot be compared, that 'oil and water' do not mix, and that strict liability, which is not founded on negligence or fault, is inhospitable to comparative fault principles."

106. Such an approach also should serve to emphasize that no question of comparing any fault may arise unless and until defendant establishes causal negligence against the plaintiff. *See* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 925 (10th Cir. 1984); Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984).

107. UCFA, *supra* note 95, at § 2(b).

108. *Duncan*, 665 S.W.2d at 427. *See also* Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (applying law of the Virgin Islands); Mauch v. Manufacturers Sales & Service Inc., 345 N.W.2d 338 (N.D. 1984). *See generally* Gershonowitz, *Comparative Causation As An Alternative To, Not A Part Of, Comparative Fault In Strict Products Liability*, 30 ST. LOUIS U.L.J. 483 (1986).

109. The statute provides that the "[d]efendant may plead and prove the fault of the *plaintiff* as an affirmative defense." Thus, concern is raised as to the traditional application of the imputed contributory defense in the products liability context. Such a defense would arise, for example, in the employment or wrongful death situation. The continued vitality of this defense is probably guaranteed by the second sentence of this section which provides that "[a]ny fault *chargeable to the*

substandard behavior:[110] unanticipated use,[111] unintended use,[112] contributory fault,[113] constructive contributory fault,[114] contributory negligence[115] and failure to mitigate.[116] These specific examples, therefore, provide for four general species of conduct: product misuse[117]—sometimes called abnormal use, assumption of risk,[118] failure to use reasonable care[119] and failure to mitigate.[120] Of these, the

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plaintiff shall diminish proportionately the amount awarded as compensatory damages. . . ." *See* UCFA, *supra* note 95, at § 1 Comment providing that "contributory fault chargeable to the claimant" includes "legally imputed fault . . .and a wrongful-death action."

110. The Texas Supreme Court has adopted a similar scheme, whereby previously distinct affirmative defenses are treated as examples of plaintiff fault. *See Duncan*, 665 S.W.2d at 428. *Cf.* Simpson v. General Motors Corp., 108 Ill. 2d 146, 483 N.E.2d 1 (1985) (Illinois refuses to include plaintiff's negligent behavior in its comparative causation regime). For a somewhat different statutory regime, *see* N.C. GEN. STAT. § 99B-4 (1979).

111. H.B. 700, *supra* note 15, at § 36.3(1) provides: "The failure to use the product as reasonably anticipated by the manufacturer." In the Senate, an amendment to this subsection had been proposed: "Use of the product in a manner for which the product is not adapted and where such use is not reasonably anticipated by a reasonable manufacturer." The amendment subsequently was withdrawn. MO. SENATE J., March 3, 1987, at 348.

112. H.B. 700, *supra* note 15, at § 36.3(2) provides: "Use of the product for a purpose not intended by the manufacturer."

113. *Id.* at § 36.3(3) provides: "Use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger."

114. *Id.* at § 36.3(4) provides: "Unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger."

115. *Id.* at § 36.3(5) provides: "The failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances."

116. *Id.* at § 36.3(6) provides: "The failure to mitigate damages."

117. Just as defendants tend to speak in broad terms with regard to, for instance, the state of the art "defense," so also are they inclined to include several different concepts within their statement of product misuse. The distinction between misuse (foreseeable use) as part of plaintiff's case and misuse (abnormal use) as part of defendant's case is discussed *infra*, notes 122-32.

118. Conceptually this type of case is quite simple because it will track existing Missouri doctrine dealing with contributory fault. Thus, defendant will have to establish plaintiff's knowledge of the danger, her appreciation of the danger, and her voluntary exposure to it. H.B. 700, *supra* note 15, at § 36.3(3). Additionally, a new form of contributory fault which falls on the assumption of risk/contributory negligence borderline has been introduced, based as it is on an unreasonable failure to appreciate a danger. *Id.* at § 36.3(4). Missouri thereby avoids many of the problems that have occurred in other jurisdictions as to the types of assumption of risk that are to be subsumed under a comparative fault regime. *See, e.g.*, Jones v. M.T.D. Products, Inc., 507 F. Supp. 8 (M.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3d Cir. 1981); Zahrte v. Sturm Ruger & Co., 203 Mont. 90, 661 P.2d 17 (1983).

119. This would include negligence *per se*.

120. Presumably this provision should be read as providing for an affirmative defense in cases where there has been a failure to take *reasonable* steps to mitigate damages. *See, e.g.*, Graffunder v. City of Mahtomedi, 376 N.W.2d 282 (Minn. Ct. App. 1985). The defendants negligently failed to prevent sewage back-ups onto plaintiff's property. Plaintiff might have eliminated or reduced his damages if he had installed a back-check valve. The court held that this did not constitute failure to mitigate given (i) the questionable effect that the valve would have had and (ii) the relatively high cost of the valve in comparison with the injuries suffered.

misuse and absence of due care provisions involve the most exacting practical questions and, because of their pro-defense leaning, seem destined to have the most profound distributive effects.

C. Product Misuse

House Bill 700 suggests that in the future the use (or misuse) of the product will not only continue to arise in plaintiff's case, but also will be a basis for an affirmative defense of comparative fault. Thus a most difficult question is posed. Logically, may the issue of reasonably anticipated use arise both as part of plaintiff's case[121] and also as part of defendant's case?[122] Most likely this argument will arise in a *plaintiff's* argument either that the legislature's adoption of an affirmative defense of misuse has deleted the converse from plaintiff's case, or that having proved this use was foreseeable as part of her case it would be illogical to permit defendant to re-argue the issue.

However, the new statute appears to confirm Missouri's position at common law[123] that a crucial aspect of a products liability claim is proving that "[t]he product was used in a manner reasonably anticipated."[124] The argument will be made that section 33, the definition section of this part of House Bill 700, is not a codification of the common law, but rather is a mere statement as to the general applicability of the sections[125] that follow. Yet this seems to run counter to the clear wording of the statute. Furthermore, the issue of the utilization of the product[126] does not occur in plaintiff's case by accident. A product's legal defectiveness must be judged within the context of its utilization.[127] This is doctrinally expressed as requiring an initial determination of whether the product is defective for its reasonably anticipated (or foreseeable) use.[128]

At common law the issue of foreseeable use (or misuse), *strictu sensu*, did not recur as part of defendant's case. Therefore, when a court endorsed "product misuse" as an affirmative defense,[129] it was making an inaccurate reference to

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121. H.B. 700, *supra* note 15, at § 33(2).

122. *Id.* at § 36.3(1).

123. *Klein*, 714 S.W.2d at 900.

124. H.B. 700, *supra* note 15, at § 33(2).

125. Dealing with state of the art and comparative fault.

126. Of course, defendants always will insist that any unintended use of the product should not involve liability. Missouri, however, uses an objective, foresight approach. In that regard it should be noted that reasonably foreseeable use and reasonably anticipated use appear to be interchangeable. *See generally* Terry, *supra* note 59, at 41-43. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

127. This is the case whether the risk-utility or the consumer expectations test is being utilized.

128. *See, e.g.*, General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349 (Tex. 1977). *See also Williams*, 261 N.E.2d at 309.

129. For an example of defendant's burden in such a case, see Harville v. Anchor-Wate Co., 663 F.2d 598 (5th Cir. 1981) (applying law of Texas).

> [T]he defense of misuse is asserted after a product is found to have been unreasonably dangerous, and this defect is found to be a producing cause of the injury. Then the

conduct which constituted the recognized affirmative defenses of assumption of risk (contributory fault)[130] or, in some jurisdictions, comparative negligence.[131]

Consider the following hypothetical. A manufacturer distributes an automobile fitted with original equipment tires that are capable of speeds up to 100 miles per hour. The vehicle itself is capable of speeds up to 120 miles per hour. The tire has a remediable design defect which appears at 115 miles per hour, at which speed the tire suffers a blow out and the vehicle crashes injuring the plaintiff. Presume that plaintiff will be able to meet her burden of proof that driving at 115 miles per hour was a foreseeable use,[132] that the product (the vehicle fitted with those tires) was defective and unreasonably dangerous, and that the defect was the proximate cause of the plaintiff's injuries. Consider the following scenarios and the defensive postures that the manufacturer could take under the new Missouri law.

(i) The plaintiff was a bystander. Unless she had a relationship with the driver of the vehicle such that the driver's fault was chargeable to her,[133] the defendant would be without an affirmative defense. In particular, the issue of foreseeable or intended use could not be resuscitated.

(ii) The plaintiff was a passenger in the vehicle. Her injuries would have been reduced if she had worn her seat belt. Defendant should be able to raise the issue of her fault in her failure to mitigate damages.[134]

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defendant must establish that (1) the use or misuse of the product was neither intended nor reasonably foreseeable from the manufacturer's or supplier's perspective, (2) the plaintiff could reasonably foresee an injury occurring as a result of the misuse, and (3) the misuse was a producing cause of the injury.

Id. at 602-03.

130. The distinction between unforeseeable use and assumption of risk has been clarified as follows:

> The problem appears to us to be one of failing to differentiate between misuse of a product which does not exhibit any defective condition until misused, or which does not appear to be defective and unreasonably dangerous, and misuse of a product when the defective and unreasonably dangerous condition is either discovered by the consumer or brought to his attention by a legally sufficient warning. While in either situation a product is being misused, the former constitutes the true category of misuse while the latter form of misuse is tantamount to the traditional concepts of incurred or assumed risk.

Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 (1970).

131. *See, e.g., Daly*, 575 P.2d at 1168-69.

132. *See, e.g.*, LeBouef v. Goodyear Tire & Rubber Co., 451 F. Supp. 253 (W.D. La. 1978), *aff'd*, 623 F.2d 985 (5th Cir. 1980).

133. H.B. 700, *supra* note 15, at § 36.2.

134. *Id.* at § 36.3(6). *See generally* MO. REV. STAT. § 307.178(3) (1986) which provides that:

> In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. *Failure to wear a safety belt in violation of this section may be admitted to mitigate damages*, but only under the following circumstances:
>
> (1) Parties seeking to introduce evidence of the failure to wear a safety belt in violation of this section must first introduce expert evidence proving that a failure to wear a safety

(iii) The plaintiff was a passenger in the vehicle. The driver was intoxicated. Defendant will argue either assumption of risk[135] or constructive assumption of risk,[136] depending, *inter alia*, upon the plaintiff's knowledge of the intoxication.[137]

(iv) The plaintiff was the driver of the vehicle. The defendant will argue that the failure to steer the vehicle following the blow-out constituted contributory negligence.[138]

All of these examples involve the utilization of traditional doctrinal routes[139] to identify, and then screen out from full redistribution, risks incurred by certain individuals who had good accident, and accident cost, avoidance potential.[140] The same cannot be said for Missouri's new product misuse defense[141] which creates something of a dilemma. The defense is not a *replacement* for plaintiff's foreseeable use burden.[142] Neither does it constitute inaccurate shorthand for some other recognized affirmative defense.[143] Rather, it appears to constitute an exhumation of the issue of anticipated use which previously had been disposed.

(v) The plaintiff was the driver. The defendant raises as her affirmative defense that the vehicle was being driven at 115 miles per hour and alleges that this constituted unintended or unanticipated use.

This raises several difficult questions. First, logically how can this identical issue be raised again by the defendant? Arguably, different issues arise when a

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belt contributed to the injuries claimed by plaintiff;

(2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt in violation of this section contributed to the plaintiff's claimed injuries, and *may reduce the amount of plaintiff's recovery by an amount not to exceed one percent of the damages awarded after any reductions for comparative negligence.*

(emphasis added).

135. H.B. 700, *supra* note 15, at § 36.3(3).

136. *Id.* at § 36.3(4).

137. *See, e.g.*, Miller v. Eaton, 733 S.W.2d 31 (Mo. Ct. App. 1987) (giving of comparative fault instruction in automobile accident case is proper if there is evidence that plaintiff passenger knew or reasonably should have known of the danger posed by the defendant driver's impairment due to alcohol and had remained in the vehicle).

138. H.B. 700, *supra* note 15, at § 36.3(5). *See infra* text accompanying note 150.

139. Obviously, whether such a defense is permitted is jurisdiction-sensitive. At common law, Missouri permitted only the defense of contributory fault (assumption of risk). *See supra* text accompanying notes 89-97.

140. *See, e.g., Duncan*, 665 S.W.2d at 425. *See generally* G. CALABRESI, THE COST OF ACCIDENTS, 131 *et seq.* (1977).

141. H.B. 700, *supra* note 15, at § 36.3(1) provides: "The failure to use the product as reasonably anticipated by the manufacturer." *Id.* at § 36.3(2) provides: "Use of the product for a purpose not intended by the manufacturer."

142. *See supra* text accompanying notes 123-28.

143. The only possibilities would be conduct that would constitute contributory negligence, assumption of risk, constructive assumption of risk or failure to mitigate. Yet all of these are *independently* recognized as affirmative defenses by the statute. H.B. 700, *supra* note 15, at § 36.3(3)-(6).

court is being asked to *reduce* plaintiff's recovery rather than deny all recovery.[144] Furthermore, courts may take a very broad interpretation of anticipated use in the plaintiff's case, but a narrow one with regard to defendant's argument of unanticipated use.[145]

Second, the traditional examples of plaintiff's behavior adopted by the statute all involve what we have come to understand as plaintiff's blameworthiness, or fault. Thus, the question arises whether the unintended or unanticipated use of the product also must involve blameworthiness.[146] The examples of plaintiff's conduct given by the statute are not definitions. Rather, section 36.3 states that "'fault' is *limited* to [the examples]."[147] Indeed, blameworthiness must be considered a *sine qua non* for the finding of product misuse.[148] Otherwise, the court will be unable to distinguish between the typical speeding driver and the ambulance driver trying to deliver a critically ill patient to the hospital. In neither case, after all, does the manufacture intend the vehicle to be driven at 115 miles per hour. Furthermore, absent some fault in the plaintiff, the trier of fact has no rational basis upon which to "diminish proportionately the amount awarded."[149]

D. Comparative Negligence

Whatever the conceptual difficulties with the affirmative defense of product misuse, the provision introducing a defense based on a failure to take reasonable care may well have the greater impact. Perhaps few would quarrel with the proposition that the driver of a vehicle which begins to go out of control because of a defect in the steering mechanism should be placed under a reasonable care standard in applying the vehicle's brakes.[150] However, far more difficult questions arise as to whether the defendant will be permitted to establish an alleged lack

144. Texas law has long recognized a comparative defense of unforeseeable product misuse. *See Duncan*, 665 S.W.2d at 423.

145. Such a situation would be analogous to the construction of language in certain insurance policies. *See, e.g.*, State Farm Mutual Ins. Co. v. Partridge, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973) (insuring clause interpreted widely; similarly worded exclusionary clause interpreted narrowly). *See also* Brister v. American Indem. Co., 313 So. 2d 335 (La. Ct. App. 1975) (in exclusionary clause "automobile" did not include motorcycle). *Cf.* Thibodeaux v. St. Paul Mercury Ins. Co., 242 So. 2d 112 (La. Ct. App.), *cert. denied*, 243 So. 2d 533 (La. 1971) (in insuring clause "automobile" included motorcycle).

146. *See, e.g., Duncan*, 665 S.W.2d at 423 ("Assumed risk and unforeseeable misuse, however, are nothing more than extreme variants of contributory negligence. To varying degrees, all three defenses focus on the reasonableness of the defendant's conduct").

147. Emphasis added. Consider further H.B. 700, *supra* note 15, at § 36.2 which suggests that the *fault* of the plaintiff is key. *Cf. Final Report*, *supra* note 7, at 376, ("If the plaintiff's conduct is determined by the jury to fit one or more of these categories, it would then be defined as 'fault.'")

148. *Cf.* N.Y. CIV. PRAC. LAW, § 1411 (McKinney 1976) utilizing the phrase "culpable conduct" as the collective description for plaintiff conduct which leads to reduction of damages.

149. H.B. 700, *supra* note 15, at § 36.2.

150. *See, e.g.*, Busch v. Busch Constr., 262 N.W.2d 377 (Minn. 1977).

of reasonable care[151] merely by showing, for example, a failure to inspect for defects, the failure to discover a defect, or a failure to guard against a possible defect.[152] What is certain is that in conjunction with the provisions dealing with product misuse, the contributory negligence provision will lead to a significant reduction in the value of most products liability claims involving injuries suffered in agricultural[153] and industrial settings.[154]

VI. PUNITIVE DAMAGES

The reform relating to punitive damages is of general applicability in that it applies not only to products liability cases[155] but also to most other tort claims.

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151. *Quaere* the standard of reasonable care for a child or an unsophisticated person in such a case. *See, e.g.*, Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980) (4 year old incapable of comparative fault). *See also* Lewis v. Timco, Inc., 736 F.2d 163 (5th Cir. 1984) (untutored worker dealing with complex equipment).

152. Some jurisdictions expressly exclude these situations from their comparative fault regimes. *See, e.g.*, West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); *Coney*, 97 Ill. 2d 104, 454 N.E.2d 197; Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280, 288 (Me. 1984); *Busch*, 262 N.W.2d 377; *Duncan*, 665 S.W.2d at 432; Star Furniture Co. v. Pulaski Furniture Co. 297 S.E.2d 854 (W.Va. 1982). *See also* RESTATEMENT (SECOND) OF TORTS § 402A comment n. (1965).

153. Cases such as Love v. Deere & Co., 720 S.W.2d 786 (Mo. Ct. App. 1986).

154. Of course, there will be a small number of cases that will see a pro-plaintiff swing. Consider, for example, a clear contributory fault situation which would not have reached the jury.

155. Defense interests have long targeted the law relating to punitive damages for reform. However, according to a recent study by the American Bar Foundation, only 2.8 percent of punitive damage cases included a punitive component. Prod. Safety & Liab. Rep. (BNA) 394.

For Missouri, the modern law dealing with the recovery of punitive damages in strict products liability cases begins with Racer v. Utterman, 629 S.W.2d 387 (Mo. Ct. App. 1981), *cert. denied and appeal dismissed*, Racer v. Johnson & Johnson, 459 U.S. 803 (1982). In addition to denying that there was any fundamental inconsistency between strict liability in tort and punitive damages, *Racer*, 629 S.W.2d at 396, the Missouri Court of Appeals held that for a plaintiff to recover punitive damages in a strict products liability action, she had to prove that, "the defendant was. . .aware that [the product] was unreasonably dangerous when used as intended, and . . . was . . . indifferent to or in conscious disregard for the safety of others in marketing the product." *Racer*, 629 S.W.2d at 397. *See also* Bhagvandoss v. Biersdorf, Inc., 723 S.W.2d 392, 397-98 (Mo. 1987).

Following *Racer*, two new instructions were approved for use. MAI section 10.04 [1983 New] Damages—Exemplary—Strict Liability—Either Product Defect or Failure to Warn Submitted)

> If you find in favor of plaintiff under Instruction Number (Here insert number of plaintiff's strict liability verdict directing instruction) and if you believe:
>
> First, at the time defendant sold the (*describe product*), defendant knew of the [defective condition and danger] [danger] submitted in Instruction Number (*Here insert number of plaintiff's strict liability verdict directing instruction*), and
>
> Second, defendant thereby showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number (*Here insert number of plaintiff's damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct. (Footnotes omitted)

MAI 10.05 [1983 New] is conceptually similar and deals with submission on both manufacturing/design defect and marketing defect theories.

The new provision does not, however, apply to actions against health care providers.[156] It has only partial effect in cases involving most intentional torts.[157]

A. Bifurcated Procedure

The most radical departure from current practice concerns the introduction of a bifurcated procedure for punitive damage cases "if requested by any party."[158] The first stage determines liability and assesses compensatory damages.[159] The second stage, using the same jury,[160] determines punitive damages.[161] Evidence of financial worth[162] is inadmissible at the first (liability) stage of any such bifurcated proceedings, "unless admissible for a proper purpose other than the amount of punitive damages,"[163] but is admissible in the second (quantification) stage.[164]

B. Judicial Control of Punitive Damage Awards

Additionally, resurrected remittitur and additur apply to punitive damage awards.[165] However, they will not operate in the same way as in compensatory situations.[166] First, the punitive provision refers to remittitur or additur "based on the trial judge's assessment of the totality of the surrounding circumstances."[167] In other words, the procedure codifies the concept of the judge as the "thirteenth juror." In contrast, the general remittitur and additur provision is phrased in terms broad enough to include appellate remittitur.[168] Second, the

156. H.B. 700, *supra* note 15, at § 45. Prior to the 1986 malpractice legislation, a punitive damage claim required a showing of "complete indifference to or conscious disregard for the safety of others." MAI 10.02. *See generally* Smith v. Courter, 575 S.W.2d 199, 206-08 (Mo. Ct. App. 1978). Mo. REV. STAT. § 538.210(5) now provides that "an award of punitive damages against a health care provider . . . shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct with respect to his actions."

157. The credit provision is inapplicable in this context. H.B. 700, *supra* note 15, at § 39(5).

158. *Id.* at § 39.1.

159. *Id.* at § 39.2.

160. *Id.* at § 39.1. A nice point arises as to whether the trial judge may overturn a jury verdict on liability based on evidence admitted in the second stage. *See, e.g.*, Stevenson v. General Motors Corp., 513 Pa. 41, 521 A.2d 413 (1987).

161. H.B. 700, *supra* note 15, at § 39.3.

162. While section 39(2) refers to evidence of "financial condition," section 39(3) refers to evidence of the defendant's net worth. It is not clear that anything was meant to turn on this distinction. Nevertheless, and given that accounting practices may differ, could the argument be made that net worth, unlike financial condition, does not include pending legal claims? At this quantification stage, exclusion of evidence of such pending claims could only be to the plaintiff's advantage.

163. H.B. 700, *supra* note 15, at § 39(2).

164. *Id.* at § 39(3).

165. *Id.* at § 39(5) provides: "The doctrines of remittitur and additur, based on the trial judge's assessment of the totality of the surrounding circumstances, shall apply to punitive damage awards."

166. *See generally infra* text accompanying notes 219-21.

167. H.B. 700, *supra* note 15, at § 39(5).

168. *Id.* at § 42 provides: "A court may enter a remittitur order. . . ."

general provisions use a "fair and reasonable compensation"[169] standard—a standard that obviously is inapplicable to review of a punitive award.

In addition, defendants may be able to reduce punitive damage judgments by making a post-trial motion[170] for credit for some previous payment or payments. However, the new provision is not without its difficulties. For example, excluded from this credit provision are many of the intentional torts.[171] Furthermore, it is unclear whether, for the credit to apply, the "debtor" (the previous) and "creditor" (the pending) causes of action both must fall within this list or only the debtor or only the creditor.

The burden of proof on all issues is on the defendant.[172] The grounds for denying motion for credit[173] are first, that the defendant's conduct in the creditor's action was different from the conduct in question in the debtor's action.[174] Second, while the conduct that was the subject of the creditor's action was the same, it had been unreasonably continued by the defendant.[175] Third, the defendant was claiming out-of-state credits and the Missouri (creditor) court found them to be inapplicable on public policy grounds.[176]

All three grounds involve difficult comparisons and judgment calls. Consider, CarCo, a Missouri corporation, which manufactures a complete line of automobiles and trucks. CarCo settles a products claim brought in Anystate concerning alleged quality control defects in the power steering system fitted to a pick-up. That (debtor) action had been brought on both negligence and strict liability theories and had involved both punitive and compensatory claims. Subsequently, a jury in Missouri awards punitive damages against CarCo in a case brought on

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169. *Id.* at § 42.

170. *Id.* at § 39.4 states:

> Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. . . .Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial.

171. *Id.* at § 39(5) states: "The credit allowable under this section shall not apply to causes of action for libel, slander, assault, battery, false imprisonment, criminal conversation, malicious prosecution or fraud." *Quaere* the situation with so-called business, or economic, torts or intentional infliction of emotional harm.

172. *Id.* at § 39(4).

173. *Id.*

174. "[If] the trial court finds from the evidence that the defendant's conduct out of which the prior punitive damages award arose was not the same conduct on which the imposition of punitive damages is based in the pending action." *Id.*

175. "[If] the trial court finds the defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerous nature of such conduct." *Id.*

176. "[I]f the trial court finds that the laws regarding punitive damages in the state in which the prior award of punitive damages was entered substantially and materially deviate from the law of the state of Missouri and that the nature of such deviation provides good cause for disallowance based on the public policy of Missouri." *Id.*

a strict liability theory in which plaintiff had alleged the defective design of the power steering system fitted to a passenger car. CarCo files a post-trial motion requesting that its Anystate payment be credited against the Missouri award. The fact-intensive issues that will arise will be as complex as any of those handled at trial. How does CarCo prove that the settlement payment in Anystate included an amount for punitive damages? Does "same conduct" involve normative as well as factual propositions? Thus, could plaintiff in the Missouri action argue that different conduct was at issue because the settlement in Anystate had involved a negligence count? Factually, what is "same conduct?" Is it making motor vehicles, or is making a truck different conduct from making a passenger car? Is it sufficient that the conduct in both cases involved the same (or similar) model power steering mechanism? Is it relevant that the Anystate conduct involved a quality control defect allegation, whereas the Missouri allegation was of defective design?

Presume that defendant CarCo meets its burden on the issue of same conduct. Plaintiff will argue that the "defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerous nature of such conduct."[177] How will the defendant be able to carry its burden on this issue in the face of the jury determination that, "at the time defendant sold the (vehicle), defendant knew of the [defective condition of the steering mechanism and danger]. . . and [s]econd, defendant thereby showed complete indifference to or conscious disregard for the safety of others. . .?"[178] Finally, what will constitute substantial and material deviations in the laws regarding punitive damages between Anystate and Missouri? Whatever the answers to these questions, this new provision will have a dramatic effect on the settlement value of many cases which incorporate punitive counts.

C. Tort Victims' Compensation Fund

Still more confusion will be caused by the newly created "Tort Victims' Compensation Fund."[179] The *raison d'etre* of this new fund is that it shall be the recipient of "[f]ifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses." Unfortunately, several difficult problems arise. First, it is unclear at what stage a *final* judgment has been rendered. While the wording of the provision suggests that this would occur when judgment is entered by the trial judge, logic dictates that it cannot occur

177. *Id.*

178. MAI 10.04 [1983 New] Damages—Exemplary—Strict Liability—Either Product Defect or Failure to Warn Submitted.

179. H.B. 700, *supra* note 15, at § 40 provides:

1. There is created the "Tort Victims' Compensation Fund.". . .

2. Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed rendered in favor of the state of Missouri. The circuit clerks shall notify the attorney general of any final judgment awarding punitive damages rendered in their circuits. . . .

prior to disposition of all appeals. Second, the statute only refers to *judgments*. There is no mention of settlements. Thus, the provision may be circumvented by settling punitive damage claims.[180] Third, it should be possible to design a contingency fee agreement whereby attorneys' fees and expenses are satisfied first from any punitive award.[181] Any complaints that may be harbored by the Attorney General with regard to such strategic behavior will be difficult to act upon because the statute provides that, "[t]he State of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding under this section."[182]

VII. JOINT LIABILITY AND RELATIVE FAULT[183]

A. In General

Almost ten years ago the Missouri Supreme Court introduced a relative fault approach to non-contractual indemnity and contribution between non-contractual judgment and non-judgment tortfeasors.[184] Two inter-related issues arise for consideration in a post-*Whitehead & Kales* environment. First, given that the underlying premise of *Whitehead & Kales* (and, for that matter *Gustafson v. Benda*[185]) was to permit the jury to determine the relative fault of all the parties, should that determination extend to, for example, settling or immune "defendants?"

Second, should the jury's determination of the relative fault of defendants affect the plaintiff-tortfeasor relationship or only the tortfeasor relationship *inter se*. In other words, should the rules of joint and several liability be abrogated or modified such that a tortfeasor is only responsible to the plaintiff for her equitable share of the verdict? Missouri courts have been steadfast in replying in the negative to both of these questions.[186]

By way of example consider the employee injured at work by a defective product, in part because of the negligence of her employer. Needless to say, neither the worker's compensation rights of the employee nor any subrogation rights enjoyed by the employer abrogate the rights of the employee to bring

180. Thus, a whole array of new settlement considerations will come into play.

181. Indeed, it may be argued that this conforms to the literal wording of the provision.

182. H.B. 700, *supra* note 15, at § 40.3.

183. *See generally* Comment, *Where is the Principle of Fairness in Joint and Several Liability—Missouri Stops Short of a Comparative Fault System?* 50 MO. L. REV. 601 (1985); UCFA, *supra* note 95.

184. Missouri Pacific R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978) (en banc).

185. 661 S.W.2d 11 (Mo. 1983) (en banc).

186. A related argument has been made to the effect that the adoption of comparative (as opposed to relative) fault should lead to the abrogation of the joint and several liability rule. *See generally Coney*, 454 N.E.2d at 204-06.

an action against a non-employer product manufacturer.[187] The product manufacturer's first instinct will be to implead the employer.[188] This may be resisted by the employer on the basis of its statutory workers' compensation immunity. As the Missouri Court of Appeals recently has stated, "[i]n order for a party to maintain an action for contribution, actionable negligence must exist between the plaintiff and the one from whom contribution is sought."[189] Neither may the defendant bring an action for contribution or indemnity against the third party employer,[190] unless the employer was in breach of an express contractual duty owed to the manufacturer.[191]

It has been suggested that the principles adopted by the supreme court in *Whitehead & Kales* mandate that the relative fault of *all*, and thus immune or released defendants, should be determined by the jury.[192] Although this has some validity, the supreme court stated in *Whitehead & Kales* that "nothing that transpires between [concurrent tortfeasors] as to their relative responsibility can reduce or take away from plaintiff any part of his judgment."[193] Clearly, limiting the non-employer's liability to its share as determined by the principles of relative fault would be fundamentally inconsistent with the principles of joint and several liability.[194]

The abandonment of these general principles has little support on the supreme court as presently constituted.[195] Recent appellate decisions confirm that the jury will not be permitted to determine the relative fault of non-party defendants who are, for example, settling tortfeasors,[196] or who benefit from sovereign immunity.[197] However, the Missouri legislature has targeted important

187. *See* Hoppe v. Midwest Conveyor Co., Inc., 485 F.2d 1196, 1203 (8th Cir. 1973). Furthermore, judicial attitudes toward the concept of foreseeable use make it very difficult for a manufacturer to establish in such a case that the *employer's* negligence was the sole cause of the employees injury. *See, e.g.*, Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922 (Minn. 1986).

188. *See* Welkener v. Kirkwood Drug Store Co., 734 S.W.2d 233, 241 (Mo. Ct. App. 1987) (contribution and indemnity principles apply to those in chain of distribution of a defective product).

189. Osburg v. Gammon, 704 S.W.2d 268, 269 (Mo. Ct. App. 1986) (citation omitted). *Accord*, Sweet v. Herman Bros., Inc., 688 S.W.2d 31, 32 (Mo. Ct. App. 1985).

190. State *ex rel.* Maryland Heights Concrete Contractors, Inc. v. Ferriss, 588 S.W.2d 489, 490 (Mo. 1979) (en banc).

191. McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788, 796 (Mo. 1959). *See* Parks v. Union Carbide Corp., 602 S.W.2d 188, 189-90 (Mo. 1980) (en banc) (such an intent to indemnify must be expressed by "clear and unequivocal terms"); *See also Maryland Heights*, 588 S.W.2d at 490.

192. *See, e.g.*, *Maryland Heights*, 588 S.W.2d at 492 (Donnell J., dissenting).

193. *Whitehead & Kales*, 566 S.W.2d at 474.

194. *See also Coney*, 454 N.E.2d at 204-06 (rejecting defendant's argument that adoption of comparative fault should result in judicial abrogation of joint and several liability). *Cf.* Uniform Product Liability Act § 111[B](2), 44 Fed. Reg. 62,714, 62,735 (1979).

195. *Cf. Parks*, 602 S.W.2d at 197-201 (Welliver J. dissenting).

196. Schiles v. Schaefer, 710 S.W.2d 254 (Mo. Ct. App. 1986).

197. State *ex rel.* Missouri Highway and Transp. Comm'n. v. Appelquist, 698 S.W.2d 883 (Mo. Ct. App. 1985). For the most recent developments with regard to settlements and relative fault, see

aspects of the relative fault and joint liability rules for abrogation. Thus, as part of the reform of malpractice law undertaken in 1985,[198] the relative fault of a settling defendant will be assessed by the jury, and a dollar amount representing that percentage of fault will be deducted from the verdict.[199] In contrast, under Missouri's general contribution statute,[200] the actual settlement figure would have been deducted from the subsequent verdict against the non-settling defendants. Furthermore, the same malpractice legislation, while preserving several liability, subjected joint liability to what may be termed a pyramiding rule.[201]

B. Products Liability and General Torts Cases

Missouri's new tort reform, which applies to actions other than those brought against health care providers, is far less radical.[202] In cases in which the plaintiff has been adjudged entirely innocent, the traditional rules providing for joint and several liability continue to apply.[203] However, in cases in which some fault has been assessed to plaintiff, the defendant may in a narrowly circumscribed set of circumstances apply for a reallocation of responsibility for certain amounts awarded by the jury.[204] Specifically, this statutory reform

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Hampton v. Safeway Sanitation Servs., Inc., 725 S.W.2d 605 (Mo. Ct. App. 1987) (interpreting section 537.060, the court held that a non-settling tortfeasor found by the jury to be partially at fault, is relieved from liability when the verdict is less than the settlement between the plaintiffs and one of the settling tortfeasors).

198. *See generally* Terry, *supra* note 6, at 479-82.

199. "[T]he claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release." MO. REV. STAT. § 538.230.3 (1986).

200. *Id.* at § 537.060.

201. "[A]ny defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant." Id. at § 538.230(2).

202. *Cf.* Washington's 1986 Tort Reform Act which, while stopping short of adopting a pure several liability system, introduced considerable limitations on the traditional joint and several liability approach. *See generally* Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67 (1986).

203. H.B. 700, *supra* note 15, at § 41.1 provides:

> In all tort actions for damages, in which fault is not assessed to the plaintiff, the defendants shall be jointly and severally liable for the amount of the judgment rendered against such defendants.

204. *Id.* at § 41.2 provides that:

> In all tort actions for damages in which fault is assessed to plaintiff the defendants shall be jointly and severally liable for the amount of the judgment rendered against such defendants except as follows:
>
> (1) In all such actions in which the trier of fact assesses a percentage of fault to the plaintiff, any party, including the plaintiff, may within thirty days of the date the verdict is rendered move for reallocation of any uncollectible amounts;
>
> (2) If such a motion is filed the court shall determine whether all or part of a party's

is designed to lessen the burden on a joint tortfeasor where a judgment co-defendant is found, for example, to be insolvent.[205] "It avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several, which would cast the total risk of uncollectability

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equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault.

205. By way of example consider the following situation. A sues B, C and D. A's total damages are assessed at $100,000. The relative/comparative fault of the parties is assessed as follows:

A: 20% ($20,000);
B: 30% ($30,000);
C: 40% ($40,000);
D: 10% ($10,000).

On proper motion to the court pursuant to H.B. 700, *supra* note 15, at § 41.2(1), C prays for reallocation on the basis of D's insolvency. The court determines that D's equitable share is uncollectible and, pursuant to section 41.2(2), reallocates the uncollectible amount by reference to the relative responsibilities of the remaining parties as follows:

A: 20% ($20,000) + 2/9 of $10,000 ($2,222) $22,222;
B: 30% ($30,000) + 3/9 of $10,000 ($3,333) $33,333;
C: 40% ($40,000) + 4/9 of $10,000 ($4,444) ..... $44,444.

It must be remembered that section 41.3 provides that:

This section shall not be construed to expand or restrict the doctrine of joint and several liability except for reallocation as provided in subsection 2.

Thus, following the reallocation, the usual rules of joint and several liability should continue to apply. Therefore B and C will be *jointly* liable for $77,777.

Suppose, however, that it had been C and B who had become insolvent. D brings proper motion for reallocation. The judge reallocates C's share among A and D.

A: 20% ($20,000) + 2/3 of $70,000 ($46,667) $66,667;
D: 10% ($10,000) + 1/3 of $70,000 ($23,333) ..... $33,333.

However, such reallocation would run counter to section 41.2(4) which provides that:

No amount shall be reallocated to any party whose assessed percentage of fault is less than the plaintiff's so as to increase that party's liability by more than a factor of two;

In our example D's original assessed percentage of fault (10%) was less than the plaintiff's (20%) and the proposed reallocation would increase D's liability by $23,000 which is more than by a factor of two.

It is unclear whether, in this situation, D can resist *any* reallocation or only that portion of the reallocation that increase his exposure by more than the stated factor. *I.e.*, in this case, is all reallocation to D to be denied or only the final $13,333? Expediency would tend to suggest the former. If not, what would the court do with that $13,333? Allocate it amongst the other parties? On what basis? In the example given it would all be allocated to the remaining party, plaintiff A. If there was more than one party remaining would a second stage of reallocation take place on the basis of their relative fault *not* taking into account D's share?

Note also that section 41.2(3) states: "The party whose uncollectible amount is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment." For what? To whom? Presumably to the plaintiff and defendant(s) for the amounts reallocated to them. There appears to be no time limit with regard to this continuing liability. Thus the judgment tortfeasor and the plaintiff to whom an insolvent judgment defendant's share has been reallocated will become unsecured creditors in the insolvent's bankruptcy.

upon the claimant."[206] This reallocation procedure[207] apparently was patterned after a provision contained in the Uniform Comparative Fault Act.[208]

The core of the reallocation provision is that a "party's equitable share . . . is uncollectible."[209] It seems arguable that implicit in the concept of uncollectibility is a legal right to collect.[210] If so, a share that would have been adjudged against a nonjudgment tortfeasor (for example, a co-defendant who went into Chapter 11 bankruptcy and against whom proceedings were stayed by the bankruptcy court) may not be subject to the post-judgment reallocation procedure.[211]

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206. *Id.* at 43, Comment to section 2. *Cf. Duncan*, 665 S.W.2d at 429:

> Imposing the risk of an insolvent defendant on the remaining defendants is justified as a matter of public policy because the defendants' conduct or products endangered another person, the plaintiff, while the plaintiff's conduct only endangered himself. Furthermore, the plaintiff seeks recovery for physical injuries, but defendants' claims for contribution are merely economic. Finally, a solvent manufacturer is better able to spread the loss than is the plaintiff.

(citation omitted).

207. Specifically, the procedure is detailed in section 41.2 which provides:

> (1) In all such actions in which the trier of fact assesses a percentage of fault to the plaintiff, any party, including the plaintiff, may within thirty days of the date the verdict is rendered move for reallocation of any uncollectible amounts
>
> . . . .
>
> (5) If such a motion is filed, the parties may conduct discovery on the issue of collectability prior to a hearing on such motion;
>
> (6) Any order to reallocation pursuant to this section shall be entered within one hundred twenty days after the date of filing such a motion for reallocation. If no such order is entered within that time, such motion shall be deemed to be overruled;
>
> (7) Proceedings on a motion for reallocation shall not operate to extend the time otherwise provided for post-trial motion or appeal on other issues. Any appeal on an order of denial of reallocation shall be taken within the time provided under applicable rules of civil procedure and shall be consolidated with any other appeal on other issues in the case.

Particular note should be taken of the somewhat conservative time limits contained in sub-sections (1) and (6). Specifically, compare the thirty day rule in sub-section (1) with the one year period suggested in the Uniform Act.

208. UCFA, *supra* note 95, at § 2(d). Minnesota is alone in having adopted this provision. *See* MINN. STAT. § 604.02(2) (1984). *Cf.* ILL. REV. STAT. ch. 70, para. 303 (1979), which places the burden of the insolvent tortfeasor on the other defendants.

209. H.B. 700, *supra* note 15, at § 41.2(2).

210. *See* Hosley v. Pittsburg Corning Corp. 401 N.W.2d 136, 139 (Minn. Ct. App. 1987).

211. *Id.* at 139-40. In addition consider a somewhat difficult question loosely based on the facts of Jones v. St. Louis Hous. Auth., 726 S.W. 766 (Mo. Ct. App. 1987). Plaintiff sued the housing authority and its landscaping contractor for the wrongful death of her son who had been struck on the side of the head by a stick thrown from a lawnmower. Presume that the jury returned a judgment for $250,000 and apportioned the fault at 20% ($50,000) to the plaintiff, 60% ($150,000) to the Authority and 20% ($50,000) to the contractor. According to *Jones* the liability of the housing authority is subject to the $100,000 per person limitation contained in the Missouri sovereign immunity statute. The question posed is whether the "extra" $50,000 would be reallocated to the plaintiff and the contractor under H.B. 700. The answer will depend upon the court's interpretation of "uncollectible." If the Minnesota cases are followed the solution would be that the reallocation provision would not apply because that

Unlike the medical malpractice legislation, House Bill 700 contains no provision that "keeps alive" for the jury the question of the relative fault of settling tortfeasors.[212] Therefore, the question will arise as to whether it would be in a plaintiff's interest to enter into a partial settlement with a defendant whom she suspects is facing financial difficulties. The paradigm situation suggests not.[213] However, more practical considerations may dictate otherwise when there is a large number of defendants, or in other situations, where the jury may be tempted to ignore an instruction to determine the relative fault of the parties and, instead, merely arrive at some discounting percentage of fault to be allocated to the plaintiff.

$50,000 *never* was *collectible*. A different result would be obtained if the court was to treat a case involving a partially immune defendant the same as a case involving a totally immune defendant. Take a one million dollar case where A sues B (a totally immune defendant) and C. If the case had gone to trial the jury would have apportioned fault as follows:

A: 33.33%;
B: 33.33% $333,333;
C: 33.33% ..... $333,333.

Of course our totally immune B would have been dismissed out. Theoretically at least, the jury should have determined relative fault as follows:

A: 50%;
C: 50% ..... $500,000.

In other words, *the risk of B's immunity would be spread equally between A and C*. Now consider the same situation in which C is only partially immune (*i.e.*, for sums in excess of $100,000). If we take the view that, once again, A and C should equally shoulder the risk of the immunity, the risk of noncollection of $333,333 - 100,000 = 233,333 should be spread between them according to their relative fault (in this case, equally). However, the natural reading of the statute suggests that the risk of B's partial immunity should be shouldered by C alone.

212. *See, e.g.*, UCFA, *supra* note 95, at § 6, 12 U.L.A. 38, 47 (Supp. 1987).

213. For example, consider a $100,000 jury verdict for plaintiff (A) assessing equitable shares of the parties as follows:

A: 33.33%;
B: 33.33% $33,333;
C: 33.33% ..... $33,333.

A should net $66,666. However, C is insolvent and A can only recover C's liability policy limits of $20,000. Prior to H.B. 700, A would take $20,000 from C and, on the principle of joint and several liability, $46,666 from B, leaving B an unsecured creditor in C's bankruptcy for $13,333.

Following H.B. 700, B will move for post-verdict reallocation of that part of the judgment that is uncollectible from C ($13,333). This is achieved as follows:

A: 33.33% + 1/2 of C's $13,333;
B: 33.33% ($33,333) + 1/2 of C's $13,333 ..... $39,999;
A nets $39,999 + $20,000 ..... $59,999.

Consider the situation in which A has some suspicion as to C's solvency. *Theoretically*, the following should occur. A settles with C for policy limits ($20,000). A then proceeds to verdict against B. The jury considers the *relative* fault of A and B to be the same whether there are two or three parties before it. As a result, in this new two party scenario, the jury holds B 50% responsible, assessing A's equitable share at the same 50%. The same $100,000 award is given. From that $100,000, the trial judge will deduct the settlement (pursuant to MO REV. STAT. section 537.060) leaving a balance of $80,000. B pays $40,000 (50% of $80,000). A nets $60,000. Thus the result *should* be the same whether or not A settled with C.

C. Cases Involving Both Medical and Non-Medical Defendants

Missouri's medical malpractice reform legislation and House Bill 700's general tort reforms apparently were designed to be mutually exclusive.[214] Unfortunately, neither statute considers the situation in which one defendant is a health care provider[215] and the other is not, with potentially chaotic results.[216]

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214. Mo. REV. STAT. § 538.230(3) (1986) provides for the (jury) determination of a settling defendant's relative fault (and, hence, the nonsettling defendant's equitable share) and abrogates the joint and several liability rule to the extent that nonsettling judgment tortfeasors are not jointly and severally liable for that share of the judgment allocated to the settling defendant. Section 538.230(2) institutes a pyramiding modification to the joint and several liability rule such that a defendant will only be *jointly* liable for a co-defendant's equitable share which is equal to or less than her own. Section 538.230 applies "[i]n any action against a health care provider." H.B. 700 section 44 states that: "The provisions of section . . . 41, . . . of this act shall not apply to actions under section[s] . . . 538.230, RSMo."

215. Defined in Mo. REV. STAT. § 538.205(4) (1986).

216. It is arguable that the malpractice statute's pyramiding rule (section 538.230.2) simply does not apply to the equitable shares of nonhealth care defendants. *See* Terry, *supra*, note 6, at 480. Take a case in which the jury assessed percentages of relative fault as follows:

A (patient):	10%;
B (doctor):	10%;
C (nurse):	30%;
D (product manufacturer):	10%;
E (component mufacturer):	40%.

Under the malpractice act, B will not be jointly liable for C's share, but, probably, will be jointly liable for D's and E's. C will be jointly liable for B's, D's and E's shares. Irrespective of the malpractice act, D will be jointly liable for B's, C's and E's shares. Likewise, E will be liable for the shares of B, C and D.

Suppose, however, C proves to be insolvent. Because (and only because) A is partially at fault, D seeks to invoke H.B. 700 section 41.2 and move for reallocation of C's equitable share among A, B, D and E. Consider the following possibilities:

(1) The court could deny D's motion on the basis that the underlying action involved a health care provider and thus section 41.2 has no effect.

(2) The court could deny the motion on the basis that C is a health care provider and thus the reallocation rules are not applicable.

(3) The court could deny the motion with regard to any reallocation of C's equitable share to B (a health care provider), but grant it with regard to reallocation to A, D and E. This would result in the following distribution:

A:	10% + 1/6 of 30%;
B:	10%;
C:	0%;
D:	10% + 1/6 of 30%;
E:	40% + 4/6 of 30%.

The problem is that under the malpractice act's pyramiding rules, B (10%) would *not* have been jointly liable for C's 30%. However, now would B be jointly liable for the reallocated liabilities of D and E, including as they do part of C's liability?

In the event that the court chooses option # 2, an additional question is raised. Supposing D rather than C was insolvent? Presumably reallocation *of* D's share would be permitted subject to a refusal to

VIII. ADDITIONAL CHANGES

House Bill 700 contains other provisions ranging from a minor[217] modification of the collateral source rule,[218] to the resurrection[219] of remittitur[220] and the

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reallocate *to* a health care provider as in #3.

Even more difficult questions arise with regard to the malpractice act's determination of the relative fault of settling defendants.

Consider the following jury verdict for $100,000 in favor of patient A:

B (doctor):	20%;
C (nurse):	30%;
D (nurse):	10%;
E (manufacturer):	40%.

Prior to trial C settles with A for $10,000. Clearly, H.B. 700 has no effect because (i) possibly, the action is against a health care provider; (ii) the plaintiff was not at fault; (iii) the case does not involve a motion for reallocation because that provision has no application to *non*-judgment tortfeasors such as C. However, what is the impact of section 538.230.3? If B, D and E were all health care providers the jury award would be restructured such that B, D and E would be severally liable only for their equitable shares of $70,000 (incidentally, the pyramiding rule also would apply such that D would not be jointly liable for the shares of B or E, and B would not be jointly liable for E's share). Suppose, however, E is a product manufacturer.

(1) Should the court hold section 538.230.3 inapplicable on the basis that there is a nonhealth care provider involved?

(2) Should the court limit its applicability to the health care defendants? This latter approach would lead to the following situation:

B (doctor):	severally* liable for 20% of $70,000;
C (settling nurse):	liable for $20,000 settlement;
D (nurse):	severally liable for 10% of $70,000;
E (manufacturer):	severally liable for 40% of $100,000.

*The *joint* liability of B and D (but not E) would be subject to the pyramiding rule.

217. In fact the only practical change will be to permit evidence that plaintiff's special damages have been paid by another. The source of this payment (the defendant) may not be identified. The Task Force's recommendation would have gone slightly further. It would have abrogated the collateral source rule in all cases where the plaintiff had not paid for the collateral benefit. *Final Report*, *supra* note 7.

218. H.B. 700, *supra* note 15, at § 38.

219. In 1985, the Missouri Supreme Court abolished the doctrine of remittitur. Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. 1985). At that time the court stated: "What may have begun with a worthy purpose of bringing uniformity to verdicts and judgments for unliquidated damages has been eroded by added considerations and irreconcilable case by case evaluations."

220. H.B. 700, *supra* note 15, at § 42. Presumably the trial judge will examine the appropriateness of the amount awarded prior to any reduction for comparative negligence. *See* Lamborn v. Philips Pacific Chem. Co., 89 Wash. 2d 701, 575 P.2d 215 (1978). For a recent example of typical remittitur see Kavanaugh v. Nussbaum, 129 A.2d 559, 514 N.Y.S.2d 55 (1987).

The new statute is silent as to the question of appellate remittitur which was in disfavor prior even to the *Firestone* decision. *See generally* Comment, *Appellate Remittitur*, 33 Mo. L. Rev. 637 (1968). While the resurrected procedure will apply to punitive damage awards, H.B. 700, *supra* note 15, at § 39(5), it does *not* apply to medical malpractice cases, H.B. 700, *supra* note 15, at § 45. In those cases, therefore, the damage limitations introduced by S.B. 663 (1986) will continue to apply. Specifically, a noneconomic damages ceiling § 538.210(1) and the structured payment of future damages § 538.220(2).

introduction of additur.[221] Limited immunities have been introduced to protect uncompensated officers of not-for-profit corporations[222] and those involved in the clean-up of toxic wastes.[223] In addition, settlements and their more rapid processing have been encouraged by permitting prejudgment interest to run from the date of an initial settlement offer.[224]

IX. CONCLUSION

Overall, the reforms introduced by House Bill 700 reflect the ambivalence manifested by the Governor's Task Force over the question of whether there really was a "crisis"[225] that required a statutory response.[226] There is no doubt that the legislation has targeted the appropriate pro-defense sacred cows. Thus, legislators truthfully may tell the lobbyists that they have enacted reforms of the

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221. *Id. See, e.g.*, Boyce v. Herzberg, 206 N.W.2d 548 (Minn. 1973).

222. H.B. 700, *supra* note 15, at § 43 provides:

> Any officer or member of the governing body of any entity which operates under the standards of section 501(c) of the Internal Revenue Code of 1986, who is not compensated for his services on a salary or prorated equivalent basis, shall be immune from personal liability for any civil damages arising from acts performed in his official capacity. The immunity shall extend only to such actions for which the person would not otherwise be liable, but for his affiliation with such an entity. This immunity shall not apply to intentional conduct, wanton or willful conduct, or gross negligence. Nothing herein shall be construed to create or abolish an immunity in favor of the entity itself.

It should be remembered that § 43 is subject to § 44. Thus, it is arguable that not-for-profit health care providers do not fall within this section.

223. H.B. 700, *supra* note 15, at § 37 provides:

> 1. No person engaged in the business of waste clean-up of environmental hazards created by others, including asbestos, shall be liable for any damages arising from the release or discharge of a pollutant, resulting from such activity, in an amount greater than one million dollars to any one person or three million dollars to all persons for a single occurrence. The limitation of liability of this section shall not:
>
> (1) Affect any right of indemnification which such person has, or may acquire by contract, against any other person who is liable for creating an environmental hazard;
>
> (2) Apply to persons who intentionally, wantonly, or willfully violate federal or state regulations respecting the clean-up process.
>
> 2. For purposes of the section, the phrase "business of waste clean-up of environmental hazard" shall mean an activity including the investigation, evaluation, planning, design, engineering, removal, construction and ancillary services, which is carried out to abate or clean-up a pollutant.

224. MO. REV. STAT. § 408.040.2(2) (1986) provides that: "In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest . . . shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. . . ."

225. For a critical reply to the prevalent crisis mongers, see Terry, *The Malpractice Crisis in the United States: A Dispatch From the Trenches*, 2(5) PROF. NEGL. 145-50 (September/October 1986).

226. *Final Report*, *supra* note 7.

law relating to joint and several liability, punitive damages, comparative fault and state of the art. However, with the important exception of comparative fault in products liability cases, the substantive effect of these reforms is minimal.[227]

Furthermore, an even heavier, administrative cost has been exacted by this piece of compromise legislation. Innumerable and difficult problems of interpretation lie in ambush for the Missouri courts.[228] For, as with the malpractice legislation of 1986, the Missouri legislature has demonstrated that its talents lie elsewhere than in the drafting of clear and unambiguous tort reform legislation.[229]

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227. In fact even major tort reforms passed by state legislatures seem to have minimal effects. According to a study commissioned by the Insurance Services Organization, the perceived impact on insurance costs of the reforms enacted in 1986 is "marginal to non-existent." Prod. Safety & Liab. Rep. (BNA) 395.

228. Additionally, it is inevitable that the question of constitutional challenge will be raised. For example, an equal protection challenge could be posited on two grounds. In the case of the products liability provisions, the challenge will be on the basis that products liability plaintiffs are being treated differently from torts plaintiffs generally. In the case of the general tort reform, the challenge will be based on the different treatment afforded plaintiffs whose cases fall within one of the new provisions and those whose claims do not. Missouri takes a hands-off approach to equal protection challenges such as this and will utilize a low level of scrutiny. It is expected that the legislation will survive any such equal protection challenges. *See generally* Terry, *supra* note 6, at 483-88. More difficult to predict would be the result of a challenge premised on Missouri's enshrined right to trial by jury. *See* MO. CONST. Art. 1 § 22(a) providing, ". . . the right of jury trial as heretofore enjoyed shall remain inviolate." Most likely to come under fire on this basis are the new statute's provisions dealing with remittitur and the more novel requirements that the trial judge should exercise tasks traditionally left within the ambit of the jury; for example, additur (which lacks the conceptual basis traditionally enjoyed by remittitur) the punitive damage credit and relative fault reallocation provisions. With specific regard to remmittitur, consider *Firestone*, 693 S.W.2d at 110 (Mo. 1985), wherein the supreme court abolished the doctrine of remittitur, holding it to be neither "a provision of statute or rule in Missouri." In *Firestone* the court noted that "[A]pplications [of remittitur] have been fraught with confusion and inconsistency. Its application in the appellate courts has been questioned since its inception in Missouri as an invasion of a party's right to trial by jury. . . ." *Id.*

229. Although perhaps not the most egregious example contained in H.B. 700 but certainly of great practical impact is the amendment to MO. REV. STAT. § 509.050 which was designed to bring all tort claims into line with the position enjoyed by medical malpractice claims by making impermissible the inclusion of any dollar amount in the *ad damnum* clause. *See* SUP. CT. R. 5506. Unfortunately, the provision as drafted may have the effect of extending that to *all* claims. *Cf.* SUP. CT. R. 55.05 (newly amended). This not only creates confusion but also provides a possible ground of constitutional challenge under Missouri's multiple subjects rule. *See e.g.*, Westin Crown Plaza v. King, 664 S.W.2d 2 (Mo. 1984) (en banc).